

Arguably, one of the most gratifying instances as a legal advisor is getting a client to “yes” in a timely fashion. Moreover, rare is the opportunity as a legal advisor that new legislation provides a client with a much needed or desired increase in authority. This year’s National Defense Authorization Act (NDAA) proved to be beneficial in both areas. First, it provides significant increases to funding authority and monetary thresholds for military construction projects. These increases are the most significant increases in this area since 2001, the last time many of the authorities for military construction were significantly increased.¹ Second, the expansions of authority and increased thresholds for military construction projects have the potential to result in more projects being approved, funded, and executed outside of the Congressional appropriations cycle. The end result is more authority and increased thresholds for commanders, coupled with the effective removal of potentially time consuming impediments and uncertainty associated with the Congressional appropriations cycle.

On December 19, 2014, the 2015 NDAA was signed by President Barack Obama and became Public Law 113-291.² Its terse stated purpose is “to authorize appropriations for fiscal year 2015 for military activities of the Department of Defense, for military construction . . . to prescribe military personnel strengths for such fiscal year, and for other purposes.”³ Despite its rather generic self-description and dauntingly voluminous stature, some of the more impactful changes appear in section 2802, which details significant increases in military construction funding authority and serves to update statutory authority in this area.⁴ Most important to Army commanders and their legal advisors is the increase in authority to use Operations and Maintenance (O&M) funding for minor military construction projects costing not more than \$1,000,000, a generous increase in spending authority from \$750,000.⁵ More significant, perhaps, is the increase in the authority to use Unspecified Minor Military Construction (UMMC) funding, a lump sum appropriation provided by Congress to the service secretaries

for minor military construction,⁶ to fund military construction projects not exceeding \$3,000,000, an increase of \$1,000,000 from the previous cap of \$2,000,000.⁷

So what does this mean for commanders and legal advisors? Quite simply, it means that commanders *may* be able to use their O&M to fund military construction projects up to \$1,000,000.⁸ It also means that the Army will be able to fund military construction projects not exceeding \$3,000,000 without having to wait for the Congressional appropriations cycle, thereby increasing the speed and effectiveness of these relatively “minor” projects.

As a cautionary note, however, the authority for commanders to use their O&M for minor military construction projects not exceeding \$1,000,000 is subject to a delegation of authority from the Secretary of the Army.⁹ Although this delegation has been historically executed via memorandum, the last delegation of authority for commanders to use their O&M for minor military construction only authorized projects not exceeding \$750,000, the cost ceiling for O&M funded construction prior to the 2015 NDAA. So, despite the new legislation and statutory increase in authority to use O&M, legal advisors must ensure their respective commander or client has been delegated the authority to use his O&M prior to obligating funds.

Another significant increase in funding authority in this year’s NDAA relates to funding military construction that is designed to address “life, health, or safety” (LHS) concerns. This authority applies to the UMMC funding at the service secretary level only. Therefore, the Secretary of the Army may, after Congressional notification, spend up to \$4,000,000 to address a LHS concern without entering into the Congressional appropriations cycle.¹⁰ This is an increase of \$1,000,000 from the previous cap of \$3,000,000.¹¹ This

¹ National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, § 2801 [hereinafter NDAA 2012] (raising the threshold for using O&M funds for minor military construction from \$500,000 to \$750,000).

² Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 [hereinafter NDAA 2015].

³ *Id.*

⁴ *Id.* at § 2802.

⁵ 10 U.S.C. § 2805 (2014). *See also* NDAA 2012 § 2801. (The \$750,000 cost ceiling for the use of O&M funds for minor military construction had been in place since 2001, when it was increased from \$500,000).

⁶ *See, e.g.*, NDAA 2015, at Division I, Title I (providing a lump sum appropriation of \$528,427,000 for Military Construction, Army).

⁷ 10 U.S.C. § 2805 (2014). Note, however, that Congressional notification is still required to comply with 10 U.S.C. § 2805b (2015).

⁸ *See* 10 U.S.C. § 2805c (2015) (stating “The Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than \$1,000,000.”). Despite the new authority to use O&M for minor military construction not exceeding \$1,000,000, the authority for commanders to spend O&M funds is subject to delegations of authority. Therefore, any use of this authority by a subordinate commander must be as a result of a delegation of authority.

⁹ *Id.*

¹⁰ *See* NDAA 2015 § 2802.

¹¹ 10 U.S.C. § 2805a(2) (2014).

authority has changed over time from a broad authority that greatly expanded the use of O&M and UMMC to address LHS concerns, to a very restrictive funding expansion that is reserved solely for projects utilizing the service secretary's UMMC pot of money.¹²

In summary, Section 2802 expands the statutory military construction thresholds found in 10 U.S.C. §2805 as follows:¹³

(1) increases the amount of O&M funds authorized to be used for military construction projects from \$750,000 to \$1,000,000;¹⁴

(2) modifies the authority to carry out unspecified minor military construction projects by increasing the service secretary's authority from \$2,000,000 to \$3,000,000;¹⁵

(3) modifies the authority to carry out unspecified minor military construction projects designed to address LHS concerns by increasing the service secretary's authority from \$3,000,000 to \$4,000,000;¹⁶ and

(4) increases the threshold for application of secretary approval and notification requirements for O&M funded military construction projects from \$750,000 to \$1,000,000.¹⁷

After years of relatively stagnant statutory thresholds for military construction, this year's NDAA provided a much desired expansion of authority and potentially increased responsiveness for commanders and leaders desiring to engage in military construction. Although many of the new authorities require delegation and may still require Congressional notification, this year's NDAA represents a welcomed piece of legislation for both legal advisors and clients alike.

—Major Travis W. Elms

¹² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1694, §2802a (The authority to use O&M to address "life, health, or safety" concerns ended in the wake of Congress' perceived abuses of this expanded authority by commanders).

¹³ See NDAA 2015 § 2802.

¹⁴ *Id.* at § 2802c.

¹⁵ *Id.* at § 2802a(1).

¹⁶ *Id.* at § 2802a(2).

¹⁷ *Id.* at § 2802b.